



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-02-54-T
Date: 30 July 2002
Original: English

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Order of: 30 July 2002

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**DECISION ON PROSECUTION MOTION FOR TRIAL RELATED
PROTECTIVE MEASURES FOR WITNESSES (CROATIA)**

The Office of the Prosecutor

Mr. Geoffrey Nice
Mr. Dirk Ryneveld

Ms. Hildegard Uertz-Retzlaff
Mr. Dermot Groome

The Accused

Slobodan Milošević

Amici Curiae

Mr. Steven Kay, QC
Mr. Branislav Tapušković
Prof. Mischa Wladimiroff

I. BACKGROUND

1. The Office of the Prosecutor ("Prosecution") filed a "Prosecution Motion for Trial Related Protective Measures for Witnesses" on 31 May 2002 ("Motion") concerning witnesses in the Bosnia part of these proceedings. The Motion seeks the following orders:
 - (a) as a preliminary matter, leave to file the Motion in excess of the designated length for motions in the Practice Direction on the Length of Briefs and Motions;
 - (b) that the Prosecution be relieved of the Trial Chamber's order that it make public the material concerning witnesses for whom protective measures have not been specifically requested by 1 June, until such time as the outstanding witnesses who the Prosecution have not been able to contact have in fact been contacted and with whom the matter of protective measures have been discussed and any applications made and determined;
 - (c) that certain trial related protective measures be granted under Rule 75 for **22 witnesses**, including:
 - (i) closed session and a pseudonym for **4 witnesses** (set out in Table B of the Motion);
 - (ii) pseudonym, image distortion and voice distortion for **1 witness** (set out in Table C of the Motion);
 - (iii) pseudonym and image distortion for **9 witnesses** (set out in Table D of the Motion); and
 - (iv) pseudonym for only **8 witnesses** (set out in the Motion);
 - (d) that to the extent that the name, address, whereabouts or other identifying data of any of the witnesses referred to in the motion is contained in existing public documents of the Tribunal, that information is to be expunged from those documents;
 - (e) that the public and media shall not photograph, video-record or sketch any of the witnesses identified in the Motion while they are within the precincts of the Tribunal; and
 - (f) that trial related protective measures for the sensitive source witnesses may be made 30 days prior to the date the witness is intended to testify.

II. THE LAW

2. The Prosecution relies upon Rules 75 and 79 of the Rules of Procedure and Evidence of the Tribunal ("Rules"). Relevantly, Rule 75 provides as follows:

(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an in camera proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as:

- (a) expunging names and identifying information from the Tribunal's public records;
 - (b) non-disclosure to the public of any records identifying the victim;
 - (c) giving of testimony through image- or voice- altering devices or closed circuit television; and
 - (d) assignment of a pseudonym;
- (ii) closed sessions, in accordance with Rule 79;
- (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

Rule 79 provides for closed session hearings as follows:

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

- (i) public order or morality;
- (ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
- (iii) the protection of the interests of justice.

(B) The Trial Chamber shall make public the reasons for its order.

3. What the Trial Chamber must determine is the legal basis for the granting of trial related protective measures under these Rules and whether the Prosecution has satisfied the Chamber, in respect of each individual witness, that the measures sought are appropriate. It must also determine the time at which such an application is appropriately to be made. The full range of measures are sought in the Motion, ranging from the use of a pseudonym only to fully closed sessions for the hearing of testimony for some witnesses.

4. The determination of protective measures requires the Chamber to consider several interests. On one hand, the right of the accused to a fair and public trial, and to cross-examine witnesses against him; and, on the other hand, the right of victims to protection and privacy. The hierarchy between these interests is clearly reflected in Article 20 of the Statute, which provides expressly that the rights of the accused take precedence over the protection of the victims, as they are to be given “full respect”, while the protection of the victims is to be given “due regard”. This priority is further confirmed by the wording of Rule 75 (A) of the Rules, which allows a Chamber to order protective measures, “provided that [they] are consistent with the rights of the accused”.
5. In essence, what must be determined in respect of each application is whether, should it become publicly known that the witness testified, there would be a real risk to his security or that of his family. The more extreme the protection sought, the more onerous will be the obligation upon the applicant to establish the risk asserted. Furthermore, the minimum measure required to protect the witness’s legitimate fears should be utilised. Therefore, the Trial Chamber will, for example, only order closed session under Rule 79 in circumstances where it is shown that the risk to the witness is sufficiently founded and that no other less restrictive protective measure can adequately deal with that risk.
6. The four protective measures sought are the ordering of closed session, the granting of a pseudonym, the granting of voice distortion and the granting of facial distortion to a witness. With respect to the first and most extreme measure sought, it has been stated by one Trial Chamber that “the proceedings must be in public unless good cause is shown to the contrary.”¹ In the Celebici case, it was stated that “the Trial Chamber cannot without good reason, deny the accused the right to a public hearing enshrined in Articles 20(4) and 21(2).”² This is clearly correct. This Trial Chamber, whilst having granted closed session for witnesses in the past, notes that this is an extraordinary measure that will only be granted where it can be shown that a very real risk to the witness and/or his family arises from the prospect of the public becoming aware that the witness is testifying, that it would not be violative of an accused’s right to a fair trial and that no less restrictive protective measure can adequately deal with the witness’s legitimate concerns, or where there exists some other very exceptional circumstance.

¹ *Prosecutor v. Bradanin and Talic*, “Decision on Motion by Prosecution for Protective Measures”, 3 July 2000, para. 53.

7. It follows that other protective measures sought which allow a witness's testimony to take place in open session, but with methods designed to conceal his identity from the public (such as the use of a pseudonym, face and voice distortion) are considered less of an infringement on the public nature of the proceedings. Nonetheless, the Trial Chamber must consider whether it is appropriate that such measures be granted on the basis of whether the witness's fears are legitimate and well founded and the right of the accused to a fair and public trial.

² *Prosecutor v. Delalic & Ors.*, "Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed 'B' through to 'M'", 28 April 1997, para. 33.
Case No. IT-02-54-T

III. DECISION ON THE PROSECUTION'S APPLICATION

8. The Prosecution seeks the following orders:
- (a) as a preliminary matter, leave to file the Motion in excess of the designated length for motions in the Practice Direction on the Length of Briefs and Motions;
 - (b) that the Prosecution be relieved of the Chamber's order that it make public the material concerning witnesses for whom protective measures have not been specifically requested by 1 June until such time as the outstanding witnesses who the Prosecution have not been able to contact have in fact been contacted and with whom the matter of protective measures have been discussed and any applications made and determined;
 - (c) that certain trial related protective measures be granted under Rule 75 for **22 witnesses**, including:
 - (v) closed session and a pseudonym for **4 witnesses** (set out in Table B of the Motion);
 - (vi) pseudonym, image distortion and voice distortion for **1 witness** (set out in Table C of the Motion);
 - (vii) pseudonym and image distortion for **9 witnesses** (set out in Table D of the Motion); and
 - (viii) pseudonym for only **8 witnesses** (set out in the Motion);
 - (d) that to the extent that the name, address, whereabouts or other identifying data of any of the witnesses referred to in the motion is contained in existing public documents of the Tribunal, that information is to be expunged from those documents;
 - (e) that the public and media shall not photograph, video-record or sketch any of the witnesses identified in the Motion while they are within the precincts of the Tribunal; and
 - (f) that trial related protective measures for the sensitive source witnesses may be made 30 days prior to the date the witness is intended to testify.

9. With respect to the preliminary issue of the length of the Motion, the Trial Chamber accepts that the Motion is filed oversized as a result of the number of witnesses and breadth of proceedings with which it is dealing. Accordingly, leave is granted for the length of the Motion to exceed the usual limit.
10. The second issue concerns the request for the Trial Chamber to vary its previous order concerning disclosure to the public of the names of witnesses for whom protective measures were not sought by 1 June 2002. The Prosecution submits that it has made diligent efforts to contact all witnesses with respect to whether they wished to apply for protective measures and that it has been unable to contact some witnesses, whilst others will only discuss such matters in person. The Trial Chamber accepts that the Prosecution has made diligent efforts to contact the witnesses and that it continues to do so. For this reason, as well as for the reason, which will be explained below, that the Chamber believes it more appropriate for all specific trial related protective measures applications to be made at a time closer to the time the witness is intended to testify, the Trial Chamber will grant the relief sought by the Prosecution in this respect.
11. As stated above, for the protective measures sought to be granted the applicant must show that, should it become publicly known that he testified, there is a real risk to his security or that of his family. Furthermore, something more than a general expression of fear by the witness for his safety must be shown. Some specific reason must be established and the Trial Chamber must be satisfied that the fear expressed has an objective foundation.
12. With respect to the witnesses for whom protective measures are sought, the Trial Chamber has considered the justification provided in the Motion for each individual witness and will make its orders on the basis of whether the grounds asserted satisfy the test set out above. The Chamber has now had considerable experience of these matters in the Kosovo part of the trial. It has noted that protective measures applied for and granted were at times the subject of applications for variation or were dropped when it came time for a witness to testify. Furthermore, there have been frequent changes in the list of witnesses the Prosecution intended to call to testify. The Trial Chamber therefore considers it preferable for applications for protective measures at trial to be made at a time closer to the time it is intended the witness should testify. The Chamber will then be in a better position to assess the factors in favour of the application being granted.
13. For this reason, the Trial Chamber will make orders granting the witnesses for whom protective measures are sought in the Motion a pseudonym and require the Prosecution to

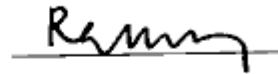
make any applications for protective measures for these witnesses closer to the time each witness is intended to testify.

14. Furthermore, the Trial Chamber will grant the Prosecution request that trial related protective measures for sensitive source witnesses granted extraordinary provisional protective measures in these proceedings may be made 30 days prior to the date the witness is intended to testify.
15. Finally, the Prosecution should produce a schedule within 21 days of the current status of all witnesses for whom protective measures are sought in the Bosnia and Croatia parts of these proceedings.

IV. DISPOSITION

16. For the foregoing reasons, the Trial Chamber **ORDERS** as follows:
- (1) Leave is granted for the length of the Motion to exceed the usual limit.
 - (2) The Prosecution is relieved of its obligation to make public the material concerning witnesses for whom protective measures have not been specifically requested by 1 June 2002, until such time as the outstanding witnesses who the Prosecution have not been able to contact have in fact been contacted and with whom the matter of protective measures have been discussed and any applications made and determined in accordance with Order (3) of this Decision.
 - (3) Applications for trial related protective measures for Prosecution witnesses identified in the Motion shall be made at a time closer to the time it is intended the witness should testify. In the meantime, the witnesses identified in the Motion and for whom protective measures are sought shall be referred to by the pseudonym identified in the Motion.
 - (4) Trial related protective measures for sensitive source witnesses granted extraordinary provisional protective measures in these proceedings may be made 30 days prior to the date the witness is intended to testify.
 - (5) The Prosecution shall produce a schedule within 21 days of the current status of all witnesses for whom protective measures are sought in the Bosnia and Croatia parts of these proceedings.

Done in English and French, the English text being authoritative.



Richard May
Presiding

Dated this thirtieth day of July 2002
At The Hague
The Netherlands

[Seal of the Tribunal]